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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Petition of the Connecticut)
Department of Public Utility)
Control to Retain Regulatory)
Control of the Rates of Wholesale)
Cellular Service Providers)
in the State of Connecticut)

PR Docket No. 94-106

DOCKET FILE COPY ORIGINAL

To: The Commission

OPPOSITION TO MOTION FOR STAY

McCaw Cellular Communications, Inc. ("McCaw"), by its attorneys and pursuant to Section 1.45 of the Commission's rules, hereby opposes the Motion for Stay ("Motion") of the Connecticut Department of Public Utility Control ("DPUC") and the Attorney General of Connecticut (collectively "Connecticut"), in the above-captioned proceeding. Connecticut asks for a stay of the FCC's order denying the DPUC's petition to retain regulatory authority over the rates of wholesale cellular service providers in Connecticut.^{1/} Because Connecticut has failed to satisfy the requirements necessary to justify a stay, its Motion should be denied.^{2/}

^{1/} Report and Order, PR Docket No. 94-106 (released May 19, 1995) ("Order").

^{2/} It is also questionable whether the FCC has authority to grant the relief requested by Connecticut. When the state failed to file a timely petition for reconsideration, by the terms of the statute, the Order became effective and the DPUC lost its authority to regulate rates. See 47 U.S.C. § 332(c)(3)(B) (if a state files a petition, its existing regulation shall remain in effect "until the Commission completes all action (including any

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A party seeking a stay must show that it has a strong likelihood of succeeding on the merits, it will suffer irreparable harm absent the grant of a stay, interested parties will not be harmed if the stay is granted, and the public interest favors the requested relief.^{3/} Connecticut fails on all counts.

Connecticut has virtually no likelihood of prevailing on the merits of its appeal. At the outset, Connecticut fails to recognize that Section 332(c)(3) imposed a "substantial hurdle" on the DPUC to justify continued regulation of CMRS rates and that the DPUC failed to meet this burden. In preempting state authority over CMRS rates, Congress sought "[t]o foster the growth and development of mobile services, that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure"^{4/} Lawmakers recognized that a patchwork of inconsistent state regulation would undermine the growth and development of mobile services.^{5/}

reconsideration) on such petition"). The FCC now has no power to reimpose the DPUC's regulatory authority without following the procedures outlined in the statute.

^{3/} Cuomo v. United States Nuclear Regulatory Commission, 772 F.2d 972, 974 (D.C. Cir. 1985); Washington Metro. Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

^{4/} H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993) ("House Report").

^{5/} See H.R. Rep. No. 213, 103d Cong., 1st Sess. 490 (1993) ("Conference Report") (intent of revised Section 332 is to "establish a Federal regulatory framework to govern the offering of all commercial mobile services") (emphasis supplied); see also

To further the legislative objectives of uniformity and the growth and development of mobile services, the Commission properly established a strong presumption against granting state petitions for authority to regulate commercial mobile services, including cellular services. Congress deliberately chose "generally to preempt state and local rate and entry regulation of all commercial mobile radio ^{6/} The DPUC completely failed to make the showing necessary to retain regulatory authority over intrastate cellular rates and the Commission's denial of its petition was entirely appropriate.

Connecticut also is incorrect in asserting that the Commission changed the standard for assessing state petitions. The Commission made clear that states could "submit whatever evidence the state believes is persuasive regarding market conditions in the state and the lack of protection for CMRS subscribers in the state."^{7/} The DPUC followed this advice explicitly and submitted reams of so-called "evidence."

Connecticut now complains that the Commission considered types of evidence not specifically listed as being "pertinent to [the FCC's] examination of market conditions and consumer

id. at 494 ("[T]he Commission, in considering the scope, duration, or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection . . . ").

^{6/} In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1504 (1994) (emphasis supplied).

^{7/} Id. at ¶ 252.

protection." This argument is disingenuous. Plainly, the degree of investment by carriers in CMRS facilities, as well as the present impact on the market by the future entry of PCS are subsumed within the factors listed by the Commission (e.g., rates of return, annual revenues, instances of anti-competitive or discriminatory practices). Moreover, as noted above, the Commission gave states the discretion to provide whatever information they deemed relevant. If carriers had been failing to reinvest profits in wireless facilities, it seems inconceivable that the DPUC would not have mentioned such a fact.

Contrary to Connecticut's allegations, the Commission did not ignore the DPUC's analysis of the impact of the entry of PCS. It simply did not agree with the DPUC's conclusion that near-term entry of competition was having no present effect on cellular rates.

Finally, the FCC did not erroneously discount the DPUC's "evidence" of discriminatory behavior by cellular carriers. Indeed, the Commission correctly stated that the DPUC had presented "no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS." Notably, as the Commission recognized, "the DPUC itself" has been unable to find through its own investigations that market conditions fail to protect consumers.^{8/} Thus, there is substantially no likelihood that Connecticut will be able to succeed on the merits of its appeal here.

^{8/} Order at ¶ 68.

Connecticut also cannot show that it or the public interest will suffer irreparable harm by failure to grant its Motion. While Connecticut generally alleges that consumers might be harmed as a result of its lack of oversight, significantly, the state does not claim that rates will rise. Entirely speculative allegations of harm such as this are insufficient to warrant grant of a stay.

Moreover, as noted previously, the public interest is better served by the regulatory forbearance embodied in the statute and the Second Report and Order. Congress specifically chose a consistent and coherent national regulatory framework for mobile services and the anachronistic regulation proposed by the DPUC is inconsistent with these goals. The Commission has recognized that consumers will be better served by allowing state regulation only in extreme cases. This is not such a case.

For the foregoing reasons, Connecticut's Motion should be denied.

Respectfully submitted,

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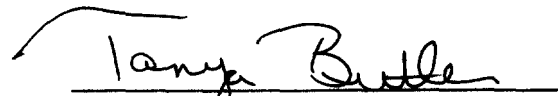
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